

CONSUMER DEBT COLLECTIONS OVERVIEW

If you are unable to pay a consumer debt—such as a personal loan, credit card balance, or medical debt—the creditor or debt collector will probably begin contacting you. There may eventually be a lawsuit against you if you don't pay. Having a debt in collections, or even being sued, is not a reason to panic, but it is important to be aware of the process so you can make informed decisions. What follows is a summary of the debt collections process, including your options at each phase. Text in ***bold italics*** relates to the assistance Contra Costa Senior Legal Services (“CCSLs”) may be able to provide our clients.¹

AM I JUDGMENT PROOF?

Knowing whether you are “judgment proof” is important for understanding your options. California has rules (known as exemptions) that limit the types of income and property that creditors can take to satisfy a money judgment for consumer debt. (A judgment represents the court's determination that the debt is owed.) If you don't have income or property that a creditor can use to satisfy a judgment, then you are what is often referred to as “judgment proof.” Creditors can still sue you and obtain judgments—which will continue to harm your credit rating—but their ability to recover what they are owed will be very limited.

Exempt income includes social security, public benefits, and income from ERISA-qualified pensions.² Money from other sources may also be exempt if you can prove you need it for basic necessities. There are exemptions for personal property (cars, furniture, etc.) up to set amounts, but creditors almost never go to the trouble of seizing and selling personal property. Generally, you are judgment proof if:

- your type of income is exempt, or you have a low-paying job;
- you have no or very little money in the bank; and
- you do not own assets such as real estate or very valuable personal property.

Regardless of whether or not you are judgment proof, read on to learn about the collections process and your options.

THE PRE-LITIGATION PHASE

If you don't pay a consumer debt—such as a personal loan, credit card balance, or medical debt—the creditor or its debt collector will probably begin contacting you to try to work out a payment plan. Debt collectors are very good at getting what they want and may try a variety of approaches (guilt, intimidation, or even being nice), but you should never agree to a payment plan that would jeopardize your ability to pay for your housing and basic

¹ CCSLS clients must be 60 or older and residents of Contra Costa County. Assistance is subject to staff availability. This document is for general information only, and is not intended as legal advice.

² The maximum amount is set by the state and changes every 3 years. If your bank account does not contain more than double what you receive each month, you will probably be well below the limit. The current exemption amounts can be found on the California Judicial Council Website.
www.courtinfo.ca.gov/forms/documents/ej156.pdf

necessities. ***CCSLs can review proposed payment plans. Beware of debt settlement companies, and contact us for more information!***

Dealing with Original Creditors

The original creditor is the entity you first established the debt with (for example, Discover or Chase Bank). If your account is still open or is in collections with the original creditor, you can send a letter informing them of your inability to pay. You can request them not to contact you, or to contact you only by mail; they may comply, but are not obligated to. Your letter may prompt the creditor to stop asking you to pay the debt; however, they may decide to file a lawsuit against you or sell the debt to a third party.

Dealing with Debt Collectors and Debt Buyers

A debt collector, which includes an entity that bought the debt from the original creditor, may contact you about debt that is several years old. Within five days of the initial contact, they must send you a letter stating how much you owe and to whom. You have 30 days to dispute the debt (if it is not yours, or is the wrong amount), or request additional documentation (“debt verification”). They have 15 days to respond, or must cease debt collection activity until they do. You can also tell them not to contact you again, but this will not prevent them from filing a lawsuit.

CCSLs can assess your circumstances and assist with the appropriate letters.

COLLECTIONS LAWSUITS: HOW THE CASE BEGINS ³

Sometimes creditors never file a lawsuit, but sometimes they sue relatively quickly, even on small debts. Here’s what happens if you are sued for nonpayment of a debt. The case begins when the creditor files a document called a “complaint” with the court. The complaint names the creditor (which may be a debt buyer) as the plaintiff and you as a defendant. The complaint will also state why the creditor is suing you, and for how much.

The plaintiff must serve you with a copy of the complaint, summons, and some blank forms. Service might be accomplished by a process server handing you the documents, or you might receive them by mail. Your deadline to respond is 30 days from the date you are served, so make note of it. If service was by mail, you may get an extra 10 days to respond.

Deciding Whether To Respond To The Lawsuit ⁴

To preserve your rights to participate in the case, you must file a formal answer before the deadline. But it is not always necessary, or in your best interest, to answer. So the first thing to decide is whether you will respond to the lawsuit at all.

Choice 1: Answer the Complaint

You may want to file an answer if one or more of the following apply:

- You have one or more defenses to the case, such as you don’t owe the debt, you owe less than what you are being sued for, or the debt is more than four years old.⁵

³ Excerpted and edited from www.nolo.com/legal-encyclopedia/creditor-lawsuits-how-the-case-begins.html. Retrieved 9/3/18.

⁴ Excerpted and edited from the California Courts website: www.courts.ca.gov/1322.htm. Retrieved 9/3/18.

⁵ “Zombie debt” is debt that is past the statute of limitations. If you know the last activity or payment on the account was more than four years ago, the lawsuit may not be legitimate, so you need to seek legal advice.

- You think that the plaintiff cannot prove that you owe the debt and that it has the right to sue you. This may be the case where the debt has been transferred one or more times. If you believe the plaintiff lacks proof, filing an answer will allow you time to request to see what they have.
- You are not judgment proof (see pg. 1), and want extra time to try to negotiate a settlement. At this stage, original creditors usually require a significant lump sum payment to settle the case.

If you answer the complaint, you will need to attend at least one case management conference with the judge and respond to any discovery requests you receive from the plaintiff. You will need to comply with all deadlines, including trial preparation, unless the case is concluded before trial. This can be time consuming and may not be worth the effort unless you have a strong likelihood of winning or settling.

Choice 2: Strategically Default:

You may choose NOT to file an answer to the complaint when you have no ability to pay and no defenses. Choosing not to answer is known as strategically defaulting, because it will result in the plaintiff taking a default judgment.

CCSLs can assist you in determining whether to answer the complaint.

WHAT HAPPENS IF THERE IS A JUDGMENT AGAINST YOU

If the plaintiff wins at trial, or by default because you decided not to answer the complaint, the plaintiff will be granted a money judgment against you. The plaintiff, now called a judgment creditor, can start trying to collect on its judgment using some additional tools. Four of these are discussed below: debtor’s examinations, bank levies, wage garnishment, and property liens.

(1) Debtor’s Examinations⁶

A debtor’s examination is a special proceeding used by a judgment creditor to look into ways it can collect a judgment from you. You will be notified of the time and place where you are to appear to answer questions under oath about your finances and ability to pay the judgment. A debtor’s examination typically lasts no more than 15 to 30 minutes.

If you have no assets or income that the judgment creditor has a right to seize, then this may be as far as the judgment creditor can go with you. Once it learns you have nothing to give, it may walk away. (See “Am I Judgment Proof?” on the last page.)

Mandatory Participation: The key thing about a debtor’s examination is that it is **not optional**. When the creditor first sued you, you did not have to respond to its complaint or come to court if you did not dispute its claim. A debtor’s examination is different. Once the creditor has obtained a judgment and the court orders you to appear at a debtor’s examination, you must do so. You cannot go to jail if you do not pay the judgment creditor; however, you can go to jail if you fail to appear for a debtor’s exam. It is possible to request a different day and time for the examination if you are unavailable.

Contact CCSLS for questions about a notice of debtor’s examination.

⁶ Excerpted and edited from an article by Stephanie Lane at www.nolo.com/legal-encyclopedia/what-is-debtor-examination.html. Retrieved 9/3/18.

(2) Bank Levies

A bank levy is a legal process that orders your bank to hand over money from your account to the Sheriff to send to the creditor. Social security and public benefits (e.g., SSI) are exempt from this process, as long as the funds are directly deposited into your account. Pension income from ERISA-qualified plans is also exempt. There is a maximum amount you can have in your account; for example, the current exemption for social security benefits is \$3200 for an individual and \$4800 for a couple.

Other funds may not be exempt unless you can show they are needed for basic necessities. If the bank receives a levy for an account containing funds that are not clearly exempt, it will notify you that you have 10 days to oppose the levy. You do this by filing a form called a "Claim of Exemption." Your account will likely be frozen in the meantime.

If you are in the debt collections process or have outstanding judgments against you, do not mingle your exempt income with money from other sources in the same account.

If your funds are exclusively from exempt sources, CCSLS can prepare a letter to your bank alerting it in advance. CCSLS can also assist with filing Claims of Exemption.

(3) Wage Garnishment

Wage garnishment ("earnings withholding") is a way to collect money an employee owes to someone else. If you are employed, your employer may get an "Earnings Withholding Order" identifying basic information, like how much you owe and to whom. Within 10 days, your employer must give you several documents, including a Claim of Exemption form you may file to challenge the order.

The judgment creditor will be limited to no more than 25% of your take-home pay (after taxes). The employer must follow other guidelines in calculating the amount to be garnished. If you need more to support yourself and your dependents, you will need to file a Claim of Exemption. If the judgment creditor objects (and they usually do), you will be given an opportunity to explain your position to a judge.

CCSLS can assist you with this process and the forms.

(4) Property Liens

Judgment creditors can file a lien on your real property. A lien gives a creditor an interest in your property, allowing the creditor to be paid when you try to sell or refinance the home. If there is enough equity in the property to pay all the liens and other costs after deducting your homestead exemption*, the creditor may choose to force a sale of the property. Fortunately, this is rare. If the home is being involuntarily sold, the homestead exemption is automatic.

CCSLS can assist you with completing a Homestead Declaration that allows you to protect your equity in case you choose to sell your home or refinance your loan.

*Your homestead exemption is the amount of equity in your primary residence that is protected from seizure to satisfy a debt. As of 2018, the homestead exemption protects up to \$175,000 if you are 65 or older, physically or mentally disabled, or at least 55 and low income.